FINES AS AN ALTERNATIVE CRIMINAL SANCTION TO INCARCERATION: AN INTERNATIONAL PERSPECTIVE

Robert W. Gillespie, Associate Professor, Department of Economics

#712
FINES AS AN ALTERNATIVE CRIMINAL SANCTION TO INCARCERATION: AN INTERNATIONAL PERSPECTIVE

Robert W. Gillespie, Associate Professor, Department of Economics

Summary

Rising crime rates within traditional sanctioning patterns have resulted in a search for alternatives to incarceration in order to control both the economic and social (humanitarian) costs of punishment. The paper explores this response in four countries: England, Germany, Sweden, and the United States—all modern, industrial democracies. The paper focuses upon the response in terms of the role accorded monetary penalties as an alternative to incarceration. This role is analyzed in terms of the evolution of penal policy, operational experiences with fines—effectiveness and enforcement—and in the actual use of fines relative to incarceration, as a sentencing disposition for traditional crimes in each country. The major finding is that among the four countries the United States accords fines a very minor role. The reasons for this difference are explored and it is concluded that the use of fines in the United States—when compared to European experience when compared to European experience appears to be far below the level that would minimize the economic and social cost of punishment.

Acknowledgment

Financial support for this research from the Illinois Investors in Business Education and the Center for International Comparative Studies at the University of Illinois is gratefully acknowledged.
Fines as an Alternative Criminal Sanction to Incarceration: 
An International Perspective

I. Introduction:

One of the shared experiences of modern democracies has been the rapid rise of crime. While crime itself, of course, is one of the oldest problems that any social order has to deal with, the rapid rate of increase in crime rates since 1950 has placed unusual strains on the traditional institutions and methods of social control of crime. The problem can be described in human terms—number of persons victimized or rising prison populations, or in economic terms—rising expenditures of the institutions of the criminal justice system.

The institution with the least slack to absorb the rapid rise in crime has generally been the prison system. Not only is the capacity of the prison system rather rigid in the short to medium run, but this form of punishment has highest economic and social costs of any sanction. Consequently, one general response of all governments to this problem has been to seek reliance, at the margin, upon alternatives to incarceration and to seek new alternatives by innovation. The motivation to find alternatives comes not only from economic pressures, but also from a body of public and professional opinion which views incarceration as positively harmful. Those sharing this view have opposed rising new prison construction on humanitarian grounds. In the United States the pressures of rising crime rates on the criminal justice system, particularly the prisons, have been exacerbated by an effort to contain the rising crime through longer effective prison sentences.
The purpose of this paper is to explore a particular alternative sanction to incarceration, one that historically antedates incarceration, the fine. Although all countries utilize the fine to some extent as a criminal sanction, it has received far more recent emphasis in European countries both in connection with penal reform as well as a response to rising crime and prison populations than in the United States. It should be emphasized that we are concerned with the use of fines as a sanction only for offenses where incarceration is viewed as an appropriate alternative sanction. The discussion is not concerned with the use of fines for minor regulatory offenses, e.g., most motoring offenses, game law violations, etc.

In our review of the experiences of specific countries, we will explore the use of fines from three perspectives: first, we will examine the recent history of the evolution of the role of fines in penal theory and policy. Second, we shall review research on the relative effectiveness of fines and on enforcement of fines; finally, we shall examine sentencing patterns for traditional crimes where both fines and incarceration are sentencing options. A principal objective of the analysis of sentencing patterns will be to determine as accurately as possible the extent to which fines are in fact used as a substitute for incarceration in each country.

The use of fines as a sanction is not only of interest from the point of view of comparative social policy, but it has particular relevance from the point of view of the economics of punishment. As the costs of the criminal justice system rise, questions of economic efficiency become increasingly relevant. It is the main conclusion of
this paper that the use of fines in the U.S.--when contrasted with European practice--appears to be far below the level that would minimize the social costs of punishment without sacrificing the other objectives of punishment. This conclusion is arrived at after examining the use of fines in three European countries which are generally similar to the U.S. in terms of political and economic structure, i.e., developed industrial democracies. We then review the attitudes and institutional constraints which appear to be responsible for the far less extensive use of fines in the U.S.

II. The English Experience

Policy History: From the mid 1960's one of the major preoccupations of policy has been efforts to reduce the prison population and the use of imprisonment [Home Office, 1976: 5]. These goals have manifested themselves in legislation through the work of the Advisory Council on the Penal System and in the research efforts of the Home Office Research Unit. In each case the use of fines has been seen as one method of attaining the goal.

The legislative basis for the use of fines was strengthened by the Criminal Justice Act of 1967. The act increased the maximum fines which magistrates courts could impose from £100 to £400. To increase the effectiveness of collection, offenders were given longer time to pay and they could not be committed to prison in default of payment unless a court inquiry into the offenders financial means had been held and had reached the conclusion that no other means of enforcement was possible. The courts were also given the power to remit fines and to use attachment of earnings as a means of enforcement [Home Office, 1970: 5].
As a further response to the rising prison population, the Home Secretary asked the Advisory Council on the Penal System to review and to consider changes in the range of non-custodial penalties [Home Office, 1970: 1]. This inquiry produced the Council report, *Non-Custodial and Semi-Custodial Penalties*.

The Council's discussion of the use of fines was centered upon two issues. First, the principles governing how the level of a fine should be established for a given offender and a given offense. In dealing with this question they were much influenced by the Swedish Day-fine system. Under this system the gravity of the offense determines the number of day fines, then the offender's financial means is used to determine the monetary value of each day fine. It was their view that "The fine will be equitable only if it is assessed in this way and constitutes something more than payment for a license to commit the particular offense [Home Office, 1970: 7]. While they were much impressed by the day fine system, they could not recommend its immediate adoption. Practical problems of providing the court sufficient information on the offender's financial situation appeared to be the major obstacle.

The second major issue dealt with enforcement or problems of collection. They approached this issue from the premise that a fine should be truly a non-custodial penalty, that is "...that offenders upon whom a fine has been imposed should not be committed to prison if they have failed to pay that fine solely for want of the means to do so [Home Office, 1970: 9]. To further reduce the small percentage of defaulters (about 0.6% in 1969) committed to prison for default, they recommended that a proposed special Enforcement Office for civil debts also be given the responsibility for collecting overdue fines and the
power to attach the offenders property or earnings. Such an Office would also be charged with maintaining a register of defaulters which could be consulted by the courts to inform their sentencing decision in the event of recidivism. As to the question of whether prison should ever ultimately be used in the event of default, the Council was divided in their opinion. A minority favored imprisonment only if it were established by a new criminal proceeding that the failure to pay was willful. The majority rejected this on the grounds that it could seriously burden the court system and that the immediate threat of prison was the only effective sanction to motivate payment by a small but significant group of offenders.

In brief, the increasing use of fines in England and Wales has been motivated primarily by a desire to control the rising economic costs of punishment and has been accomplished substantially within the existing institutional framework. That is, there have been only modest innovations in the legal and correctional structures to make them more conducive to monetary penalties.

Operational Aspects: The English experience stands alone among the countries under review in terms of the number of research studies which have addressed the use of fines as a penal sanction. This research has been both evaluative and descriptive. The evaluative research has as its objective the measurement of the relative effectiveness of alternative punishments or treatments; the criterion for judging effectiveness is usually reconviction rates over some follow up period. The descriptive research has focused on sentencing practices of the courts, e.g., to what extent have fines been used, and enforcement practices and their results.
The earliest study deals with the effectiveness of alternative sanctions. The research was primarily based upon all offenders convicted in the Metropolitan Police District (London) during a two month period in 1957. Using a five year follow up for reconviction rates and controlling for age and prior convictions the study found that "Fines, particularly the heavier ones, appear to be among the most 'successful' penalties for almost all types of offenders [Home Office, 1969: 73]. Because of the relative paucity of research on the efficacy of fines, this study's conclusion is widely cited. The methodology, however, has also drawn both criticism and support [Bottoms, 1973; Bradbury, 1969].

The primary criticism is that so few variables were controlled for when contrasting the effectiveness of fines to other sanctions. It is possible that this effectiveness is based upon variables which were not controlled for but which some astute judges recognized and used in their sentencing decisions. Until one can be more sure that such important omitted variables do not exist, any generalization of the studies result regarding fines to other samples and judges should be considered very tentative.

A more recent study is based upon a sample of over 3,000 offenders summarily convicted of property offenses or offenses against the person during one week in Magistrates Courts in 1974 [Softley, 1978]. This is of particular interest because the reconviction rates within two years of those fined were compared to similar reconviction rates for several other sanctions imposed on those in the samples. Among the sanctions of: absolute conditional discharge, probation, suspended sentence, incarceration, or 'other,' fines had the lowest two year reconviction rate.
When the same reconviction rates were compared controlling for age and previous convictions, the reconviction rate for fines in each subgroup either was lower or not significantly different than the other sanctions taken as a group. As to payment of the fines, after 18 months 77% had been paid; however, over 50% defaulted in the sense of requiring some action to force payment or were at least three weeks late in making the payment. Somewhat surprisingly, the number of previous convictions was a better predictor of default than employment status at the time of conviction. The other important factor in predicting default was the size of the fine. The group with the highest default rate, 85%, was those with 3 or more previous convictions who had been fined over £25. The group with the lowest default rate, 16%, was those over age 30 who had been fined less than £25.

The high percentage of default notwithstanding, enforcement methods were able to achieve a payment of 72% of the total amounts fined within 18 months. Over half of those who had not paid in full within 18 months were reconvicted on another charge. Thirteen percent of the sample had prison terms fixed as an alternative to payment; about five percent of the sample were imprisoned because of default.

Although the research based upon the English experience with fines cannot be considered definitive, it does seem safe to conclude that fines are not significantly less effective than other sanctions for large classes of offenders, especially first offenders. But even this rather weak conclusion regarding relative effectiveness, provides strong support that the use of fines has reduced the economic cost of punishment. This is further strengthened by the fact that only a small
fraction of those fined were ultimately incarcerated as a result of default.

III. The German Experience

Policy History: Unlike in England, the shift in German policy towards a major reliance upon fines in lieu of incarceration, is not primarily attributable to rising prison costs produced by rising crime rates. Rather in Germany this policy change is only one result of a major reform of the penal code and penal philosophy. While it is beyond the scope of this paper to trace this reform in detail, some background is useful to compare the German use of fines with those of the other countries.

In 1954 a Grand Commission for Penal Reform (Grosse (Strafrechtskommission) was formed and given a mandate to produce a new penal code to replace the existing code which dated back to 1871. The work of the Commission provided the basis for the official government draft of 1962 [German Draft Penal Code E 1962].

Two major results of the reform were decriminalization of many minor and moral offenses, and in sentencing, a shift in philosophy from "retributive justice" towards "resocialization" [Lee and Robertson, 1973: 191; Herrmann, 1976: 720]. This change in philosophy was manifested by a general substitution of milder penalties, in particular, a decrease in the use of incarceration.

For the less serious offenses, those which previously would have received prison sentences of six months or less, fines or suspended sentences were to replace incarceration altogether. The First Law
Reforming the Penal Code, effective September 1, 1969, provided that prison terms of less than six months were to be replaced by fines or probation in all but exceptional cases. This policy was to be followed, general deterrence considerations, aside. Although short term sentences were not abolished completely, a very significant reduction was achieved as is shown in Table 1. In 1968 over one hundred and ten thousand sentences to prison terms of less than six months were awarded; in 1976 this figure dropped to only about ten thousand, even though total convictions rose. A rather remarkable achievement.

This impressive shift away from short term incarceration found support from two quite different rationales. One viewed prisons as "schools of crime" and thus not only incapable of effecting resocialization, but even counter productive in achieving this goal. The other view, professes faith in the possibility of resocialization under appropriate conditions of incarceration. These conditions include uncrowded prisons and incarceration--treatment--for an extended period [Jescheck, 1975: 305; Artz, 1979: 47]. Part of the reform program was the creation of special institutions devoted to providing treatment. These institutions, however, have yet to be completed because of budgetary restrictions. Also, in addition to budgetary obstacles, there now appears a growing doubt as to the efficacy of treatment [Kaiser, 1978: 419].

Although this increased use of fines is not a direct response to rising crime and the concomitant pressure of prosecutorial and court resources, it has nevertheless helped to relieve these pressures. To fully appreciate the resource implications of the use of fines in
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total convicted:</td>
<td>572,629</td>
<td>530,947</td>
<td>553,692</td>
<td>571,423</td>
<td>591,719</td>
<td>601,419</td>
<td>599,368</td>
<td>567,605</td>
<td>592,514</td>
</tr>
<tr>
<td>Prison Terms of less than six months, without suspension</td>
<td>113,273</td>
<td>64,073</td>
<td>23,664</td>
<td>22,207</td>
<td>20,045</td>
<td>17,747</td>
<td>18,033</td>
<td>11,350</td>
<td>10,704</td>
</tr>
<tr>
<td>% of total</td>
<td>20%</td>
<td>12%</td>
<td>4%</td>
<td>4%</td>
<td>3%</td>
<td>3%</td>
<td>3%</td>
<td>2%</td>
<td>1.8%</td>
</tr>
<tr>
<td>Prison Term of less than six months, with suspension</td>
<td>70,220</td>
<td>68,088</td>
<td>32,180</td>
<td>32,875</td>
<td>35,964</td>
<td>37,482</td>
<td>41,427</td>
<td>35,802</td>
<td>36,349</td>
</tr>
<tr>
<td>% of total</td>
<td>12%</td>
<td>13%</td>
<td>6%</td>
<td>6%</td>
<td>6%</td>
<td>6%</td>
<td>7%</td>
<td>6%</td>
<td>6%</td>
</tr>
<tr>
<td>A Fine Sentence</td>
<td>361,074</td>
<td>371,918</td>
<td>464,818</td>
<td>476,785</td>
<td>494,399</td>
<td>504,266</td>
<td>494,266</td>
<td>472,577</td>
<td>492,561</td>
</tr>
<tr>
<td>% of total</td>
<td>63%</td>
<td>70%</td>
<td>84%</td>
<td>83%</td>
<td>84%</td>
<td>84%</td>
<td>82%</td>
<td>83%</td>
<td>83%</td>
</tr>
</tbody>
</table>

Germany, on must be aware of two important aspects of German criminal law procedure: the "legality principle" and "penal orders." The legality principle requires German prosecutors to prosecute all serious crimes and, with exceptions, most misdemeanors [Langbein and Weinreb, 1978: 1561]. Indeed, some American legal scholars familiar with the important resource rationing role played by discretionary prosecution—plea bargaining—in the U.S. have characterized the adherence to the legality principle as a myth [Goldstein and Marcus, 1977: ].

This skepticism, however, has been effectively criticized. The plausibility of adherence to the legality principle is greatly enhanced by the prosecutors use of penal orders. The penal order is a form of summary prosecution and sentencing available to the prosecutor for less serious offenses, roughly misdemeanors; only fines can be imposed by a penal order. On the basis of the police investigation, and in some cases his own, the prosecutor may determine guilt and levy a fine. Penal orders, however, do require judicial approval. Further, if the accused objects, the penal order is set aside and the case goes to trial, otherwise the fine is routinely enforced [Feldsteiner, 1979: 310]. By using penal orders for the less serious crimes, but those which occur in great volume, prosecutorial resources are economized for use in prosecuting all serious crimes.

Although the shift from short term imprisonment to the use of fines and suspended sentences went into effect in 1969, a further reform law, effective in 1975, introduced a day-fine system. The day-fine is a scandinavian innovation used extensively in Sweden. The function of the day fine is to divide the fine sentencing decision
into two distinct decisions. The first is an assignment of the number of day fines according to the degree of guilt and gravity of the offense. The second is to explicitly consider the economic status of the offender and assign a unit value to the day fine for the particular offender. The absolute amount of the fine is the product of the unit value and the number of day fines. The result is a fine system which seeks to punish equally offenses of similar gravity but at the same time, given the penalty is monetary, to achieve equity across offenders of disparate financial means. While a great many legal systems, in principle, recognize the equity issue in the use of fines, most deal with it in a far less explicit manner.

Operational Aspects: The basic legal provisions of the day-fine system are that the number day fines which may be levied for an offense are restricted to a minimum of 5 to a maximum of 360. The permissable range for the unit value assessment cannot be less than 2 Deutsche Marks nor more than 10,000 Deutsche Marks. In assigning the unit value in individual cases a concept of net income is to be used. The legal guideline states "The day-fine is the average sum of money which may be daily chargeable to the offender taking into account his income, his realisable assets, his actual standard of living, his maintenance responsibilities, his normal expenditure and his family situation" [Beristan, 1976: 260].
The penal code permits incarceration in the event of default at the rate of one day of incarceration for every day-fine unpaid. This provision has been criticized both because the substitution is too harsh and because some object to use of incarceration at all [Beristan, 1976: 26; Driendl, 1976: 1152, 1154]. In fact, however, the use of incarceration as an enforcement mechanism is relatively rare. It is reported that only 2.7% to 4% of all cases involve incarceration [Kaiser, 1978: 417; Max Planct Institute, 1978: 4].

Only one study could be found that addressed the effectiveness of fines compared to other sanctions. Since fines are used most frequently for first offenders, the study compared two groups of first offenders, one group which received fines and the other received a prison sentence. The reconviction rate was 16% for those who were fined and 50% for those who were imprisoned [Max Planct Institute, 1978: 5]. Without further information on what other characteristics might have distinguished the two groups, e.g., nature of offense, age, etc., these results must be considered as providing only a tentative answer to the question of relative effectiveness of the two sanctions. This qualification, notwithstanding, the data provide support for the effectiveness of fines as used in Germany and strongly suggest that the sentencing reform has not imposed a cost in the form of higher levels of crime.

IV. The Swedish Experience

Policy History: Of the four countries studied, Sweden is unique in terms of the heavy historic reliance upon fines and in terms of the
innovations adopted to facilitate the wide use of fines. The long term extensive use of fines is illustrated by Table 2. If offenses are defined broadly, i.e., under all statues, the percent of persons sanctioned by fines is remarkable both for the high value and for the stability of this percentage over a century. This broad definition of offenses has the advantage of minimizing the impact of inevitable changes in the scope of the formal criminal law over such a long period. It also includes offenses which are sanctioned under special laws as well as under the formal penal code, e.g., even though narcotics offenses are under a special statute very heavy sanctions can still be imposed. The observed stability in the use of fines over the century can be viewed as a reflection of Swedish society's continuing commitment to humanitarian forms of punishment, notwithstanding significant changes in patterns of deviant behavior.

A somewhat different pattern emerges if one looks only at offenses under the penal code, i.e., those offenses which comprise traditional forms of criminality. This eliminates many types of quasi-criminal and regulatory offenses such as motoring offenses. As a result the percentage of offenses sanctioned by a fine, understandably, is reduced. Nevertheless, the percentage remains very high by comparison to other countries over a similarly long period. The declining trend in the use of fines is attributable, in part, to the adoption of more severe penalties for assault. In 1950 96% of those sentenced for assault were fined; in 1978 only 47% were fined [Aström, 1977: 3].

In Sweden the underlying principle of the penal code has been "...that treatment is to replace punishment" [National Swedish Council
Table 2
The Use of Fines as a Sanction in Sweden: 1871-1977

<table>
<thead>
<tr>
<th>Period</th>
<th>Persons Sentenced</th>
<th>Persons Fined</th>
<th>Percent Fined</th>
<th>Persons Sentenced</th>
<th>Persons Fined</th>
<th>Percent Fined</th>
</tr>
</thead>
<tbody>
<tr>
<td>1871/75</td>
<td>39,562</td>
<td>37,188</td>
<td>94.0%</td>
<td>--</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>1896/00</td>
<td>73,929</td>
<td>71,025</td>
<td>96.1%</td>
<td>--</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>1921/25</td>
<td>84,620</td>
<td>81,774</td>
<td>96.6%</td>
<td>--</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>1941</td>
<td>138,961</td>
<td>132,440</td>
<td>95.3%</td>
<td>--</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>1947</td>
<td>152,300</td>
<td>144,335</td>
<td>94.8%</td>
<td>--</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>1950</td>
<td>174,235</td>
<td>163,614</td>
<td>93.9%</td>
<td>19,372</td>
<td>10,483</td>
<td>54.1%</td>
</tr>
<tr>
<td>1955</td>
<td>269,535</td>
<td>254,471</td>
<td>94.4%</td>
<td>22,576</td>
<td>11,463</td>
<td>50.8%</td>
</tr>
<tr>
<td>1960</td>
<td>434,341</td>
<td>413,802</td>
<td>95.3%</td>
<td>28,849</td>
<td>14,450</td>
<td>46.6%</td>
</tr>
<tr>
<td>1965</td>
<td>336,824</td>
<td>315,314</td>
<td>93.6%</td>
<td>31,595</td>
<td>15,576</td>
<td>49.3%</td>
</tr>
<tr>
<td>1970</td>
<td>391,636</td>
<td>363,142</td>
<td>92.7%</td>
<td>40,347</td>
<td>18,777</td>
<td>46.5%</td>
</tr>
<tr>
<td>1974</td>
<td>489,266</td>
<td>460,048</td>
<td>94.0%</td>
<td>39,237</td>
<td>17,905</td>
<td>45.6%</td>
</tr>
<tr>
<td>1975</td>
<td>477,227</td>
<td>448,180</td>
<td>93.9%</td>
<td>40,232</td>
<td>19,284</td>
<td>47.9%</td>
</tr>
<tr>
<td>1976</td>
<td>466,518</td>
<td>437,511</td>
<td>93.7%</td>
<td>40,287</td>
<td>19,116</td>
<td>47.4%</td>
</tr>
<tr>
<td>1977</td>
<td>399,812</td>
<td>396,038</td>
<td>92.3%</td>
<td>42,144</td>
<td>19,635</td>
<td>46.5%</td>
</tr>
</tbody>
</table>

1 These include the Penal Code, Road Traffic Offenses, Narcotics Offenses, Smuggling and Revenue Offenses as well as breaches of regulations.

2 Excluding Drunkenness (BR 16:15) and Disorderly Conduct (BR 16:16). These two offenses are now dealt with almost totally outside the penal code. When they were in the penal code they accounted for around 60% of all sentences and the sentences were almost all fines.

for Crime Prevention, 1978: 7]. Given the resocialization objective of the penal code there has naturally followed a strong preference for humane treatments, in practice this has meant avoidance of incarceration whenever possible and then it was viewed as "treatment" not "punishment." The loss of faith in the efficacy of treatment for offenders, now widely accepted in the United States, is also beginning to influence Swedish penal philosophy.

It can be said therefore that renunciation of the treatment ideology leads to a more honest acceptance of the fact that the basis of the criminal justice system is the provision of penalties for punishable acts rather than the provision of coercive treatment for character deficiencies [Bishop, 1975: 24].

Since incarceration can no longer be viewed as only a necessary means to deliver treatment, it must be evaluated on other grounds. However, it is not seen as particularly efficacious from the point of view of general deterrence. General deterrence, while viewed as one valid function of some form of punishment, it is not accorded the priority and importance reflected in much of the U.S. literature. There still remains a strong aversion for incarceration both on humanitarian grounds and because some research results indicate that it may even be criminogenic [Bishop, 1975: 22].

One of the implications of this reappraisal of penal philosophy is that fines have even greater appeal as a sanction than heretofore. They retain their appeal as an alternative to incarceration on humanitarian grounds and further they have never been viewed as "treatment." Thus, they are consistent with the view of sanctions as punishment rather than treatment. An implication that has been drawn for penal
policy is that the scope of use of fines should be enlarged [National Swedish Council for Crime Prevention, 1978: 33]. One suggested means of greater use of fines for more serious crimes is to combine them with conditional sentences. In this wider use it has also emphasized that day-fines are the appropriate form of monetary penalty rather than flat fines.

The present law permits incarceration if the fine is not paid. Although the number of persons incarcerated annually for default is by all accounts small, there remains the concern that such incarceration falls disproportionately on disadvantaged groups.

A special commission has reviewed the use of incarceration for fine enforcement and has recommended that the legislation permitting conversion of unpaid fines to incarceration be abolished. They recognize that the present high percentage of fines paid is attributable, in part, to the threat of incarceration. However, in their view, the gains in terms of social justice from abolishing this threat would more than offset the reduction in fines collected [Betänkande avgivet av Förvandlindsstraffutredningen, 1975]. The parliament is still considering the commission's recommendation, but appears to be reluctant to abolish completely the threat of incarceration.

There is a potential conflict between the two major proposed changes in the role of fines in Sweden. If the scope for the use of fines is widened to include more serious offenses, the average size of fines levied would also be expected to rise. If the average size of fines imposed is increased, one would expect the probability of default to increase as well. And, if, in addition, the threat of incarceration
is removed, the combined effect could cause the percent of fines defaulted to rise to an unacceptable level.

Operational Aspects: The use of monetary penalties in Sweden is complicated in several respects. First, monetary penalties may be imposed, if the offender consents, through a summary procedure initiated either by policemen or by public prosecutors, or by a court sentence. The monetary penalties imposed by policemen are called "summary fines" ("breach of regulations fines") and they are for minor offenses, e.g., drunkenness, disorderly conduct, and traffic offenses. The amounts are limited to 250 krona for a single offense or 400 krona for multiple offenses. The public prosecutor is authorized to impose "summary penalties," most of which are in fact fines [Rättsstatistisk Årsbok, 1978: 163]. It is quite important to be aware of these technical distinctions in analyzing Swedish statistics as to the role played by monetary penalties.

A second complication is the variety of methods which are used to calculate the amount of the monetary penalty. As noted earlier, the day-fine method has long been in use in Sweden; however, use is still made of flat or ordinary fines, i.e., fines levied by an absolute amount. A third type of fine is "Standardized Fine;" the amount of this fine is computed as a fixed percentage of the amount of illegal monetary gain involved in certain categories of offenses, primarily tax evasion. These are now used very little as they are thought to be too mechanical and do not permit taking into account other circumstances that might be involved in the offense.
Monetary penalties imposed under the penal code are almost totally day-fines if one excludes drunkenness and disorderly conduct. Fines imposed under the special acts include both day fines and ordinary fines. However, if one excludes offenses under the Road Traffic Act, about two thirds of these fines are day fines and one third are ordinary fines. Thus, it is clear that day-fines are the dominant type of monetary sanction, except for drunkenness, disorderly conduct and minor traffic offenses.

Prosecutors may impose day-fines of up to 50 for a single offense and up to 60 for multiple offenses.Courts, however, may impose up to 120 day-fines for a single offense or up to 180 for multiple offenses. Unit values of a day-fine, although based upon the offender's economic condition, may not exceed 500 kronor nor be less than 2 kronor [Thornsted, 1975: 307]. The unit value is roughly set at 1/1000th of the offenders annual income but then adjusted downwards for taxes. The permissable range of traditional fines is from 10 to 500 kronor for a single offense or up to 1000 kronor for multiple offenses. The 500 kronor maximum may be contrasted with the 60,000 kronor maximum under the day-fines. Thus, the day-fines offer a penalty of potentially far greater severity.

Although fines play a major role in penal policy, there is surprisingly little published research on the relative effectiveness of fines as a sanction. This can be attributable, perhaps, to the strong philosophic aversion to the use of incarceration. There seems to be such a strong a priori assumption that the low social costs of fines relative to incarceration makes empirical validation unnecessary.
However, a recent study by Aström has addressed the question of relative effectiveness of fines compared to short term imprisonment. Two measures of effectiveness were used to analyze a sample of offenders convicted for four traditional crimes (assault, theft, other property offenses, and drug offenses); the effectiveness measures were recidivism and payment of fines [Aström, 1977]. A comparison of the recidivism rates across the four crimes indicated a recidivism rate for short term imprisonment to be twice the recidivism rate for court imposed fines. While these data indicate that fines are relatively more effective, it should be noted that there are no controls for age, prior criminal record or severity of the offense within the general type. Here, as with the English data, one cannot clearly differentiate the effect of the sanctions, per se, from other factors that may have been used by the courts in their sentencing decisions. This qualification notwithstanding, the existing pattern of use of fines does not appear to be imposing high costs in terms of recidivism.

The sample was also analyzed with respect to the percent of fines which were paid. It was found that over 90% of those fined did ultimately pay the fine. The percentage of persons who ultimately did not pay, surprisingly, was slightly larger for offenders in the higher socio-economic groups than those in the lowest socio-economic groups. However, a much larger percentage of those in the lowest socio-economic group required enforcement measures.

Astrom concluded that there did appear to be to exist some scope for greater use of fines within the four offenses he studied. This was based upon the effectiveness of fine collection and the fact that
short term imprisonment was being used in each crime category for offenses where the actual social damage was not great, e.g., assaults where medical attention was not required.

Another institutional innovation, in addition to day-fines and the summary penalty procedure, developed by Sweden relates to the fine enforcement process. Unlike the other countries, the courts and prosecutors in Sweden are relieved of the administrative burden of effecting the payment of fines they impose. Once levied, the fine collection process is turned over to the Debt Collection Authority (Kronofogemyndigheten). If the individual does not voluntarily pay the fine, the authority is given up to five years to collect the fine. The Authority's power and methods consistently results in collection of between 85 and 90% of all fine amounts levied [Betänkande Avgivet av Förvandlingsstraffutredningen, 1975: 88]. At the end of five years, if their efforts have not effected payment, the matter is referred back to the prosecutor or court for possible conversion of the unpaid amount to a prison sentence. The court or prosecutor, however, may take no further action or they may again refer the case back to the Authority for further efforts.

V. United States Experience

The decentralized criminal justice structure of the United States—fifty one separate criminal codes and penal systems—precludes a comprehensive review. Consequently, the policy review will deal not with legislative history per se, but rather will review the relevant policy statements of national commissions and national organizations with the stature and expertise to influence policy formulation in all
U.S. states. Similarly, the review of sentencing patterns will be very selective, not only to keep the scope manageable, but simply because published data on all sanctions imposed does not exist for most of the fifty one criminal justice systems.

**Policy History:** Several national organizations and commissions which seek to shape penal policy have offered recommendations as to the role of fines; the majority of these recommendations, however, evidence a very marked distrust of fines as a criminal sanction. Some examples will clearly establish this distrust.

The American Law Institute's Model Penal Code project has produced a model penal code. This code's influence is reflected in the substantive provisions of many recently revised state penal codes. The model code recommends fines be used only when the offense resulted in a pecuniary gain and fines alone are not to be used unless the court is affirmatively of the opinion that it will suffice to protect the public interest [American Law Institute, 1962]. The exact nature of the relevant public interest is not specified.

This distrust of the use of fines is also reflected by the American Bar Association's project on standards for criminal justice: "Because of its doubts as to the correlational value of the fine, the Committee would express a presumption against its imposition in the absence of a clear, affirmative reason" [American Bar Association, 1971]. The National Commission on Reform of Federal Criminal Laws would similarly restrict the use of fines. The rationale is: "Because fines do not have affirmative rehabilitative value and hurt an
offender's dependents more than the offender himself, fines are discouraged...unless some affirmative reason indicates that a fine is particularly appropriate" [National Advisory Commission...Proceedings, 1973; 296]. The National Advisory Commission on Criminal Justice Standards and Goals is somewhat less restrictive in its recommendations: "A fine should be imposed where it appears to be a deterrent against the type of offense involved or an appropriate correctional technique for an individual offender" [National Advisory Commission...Corrections, 1973].

In contrast, the Council of Judges of the National Council on Crime and Delinquency affirmatively urges the use of fines rather than imprisonment for all non-dangerous offenders [1972; 38]. The logical basis here is obvious—minimize the social cost of punishment. Support for greater use of fines is also given by the Committee on the Judiciary of the U.S. Senate.

The Committee is of the view that fines have been an inappropriately under-used penalty in American criminal law, even though there are many instances in which a fine in a measured amount can constitute a highly effective means of achieving one or more of the goals of the criminal justice system [1975; 893].

Although it is very clear that a widespread distrust of fines exist, the logical basis is far less so. How is "correlational value" or "rehabilitative value" defined? Would it suffice that the fine have a deterrent value irrespective of the basis, or must the fine also rehabilitate—effect a moral reformation in—the offender? While the fine may hurt the offender's dependents, would the harm for them from a fine be greater than if the offender were incarcerated?
It has been noted that considerations of just desert can make a fine an unjust punishment because, for the poor, it would result in "imprisonment for poverty" [Miller, 1956]. Implicit in this argument, however, is an assumption regarding how fines are set; in particular, it is assumed that fines are levied in fixed absolute terms and are independent of the financial means of the offender. This assumption relates to a particular institutional arrangement rather than some invariant aspect of human behavior. Further, recent Supreme Court decisions have gone some distance in eliminating the possibility of "imprisonment for poverty" [U.S. Supreme Court, 1971].

Another basis of the distrust is, for the affluent, fines would be a "license for crime." This, however, assumes that fines for many people are not punitive or that fines "debase the criminal sanction" [Packer, 1968, 223]. Either variant is difficult to sustain on a logical basis. First, in a society where material values are as venerated in practice as they are in the U.S., it strains the imagination to assume that a fine could not be set at a sufficient level, given an offender's financial means, so as to be viewed by everyone as punitive. The "debasement" argument relates to the educative or moral influence of the criminal law. In a market economy, most licit goods and services have a price attached to them which is the "penalty" for acquiring them. It could be argued that the use of fines bears such a strong analogy to a "price" of an illicit act that the moral signaling function of the criminal law is blocked. Whether this is so, must depend, in large part, on whether the fine, given its level, is viewed
as punishment. Further, the educative process is far more complicated than this argument suggests [Andenaes, 1975].

In summary, the purely logical arguments supporting the distrust of fines are far from compelling. They either take as given the existing (inadequate) institutional structures, or are based upon implicit empirical assumptions for which no supporting evidence is presented.

Operational Aspects: It is not surprising that discussions of fines as a criminal sanction proceed exclusively on an *a priori* level; empirical studies of fines in the U.S.--either descriptive or evaluative--are virtually nonexistent. Such studies that report any analysis of fines deal only with offenses on the borderline of criminal conduct, e.g., traffic offenses and disorderly conduct (drunkenness) [Lovald, 1968], [Mechem, 1968]. A summary of the research findings in this area from an extensive review of the correctional treatment literature took only three sentences.

"Fines are regarded as a punishment rather than as a treatment by metaphysicians devoted to the medical model of treatment. Despite the immense possibilities of fines for the humane administration of justice, there was only one study. Fines were associated with fewer expected reconvictions compared with probation for both offenders and recidivists." [Lipton, 1975; 242]

Absent only compelling logical arguments or empirical evidence that fines are less effective than incarceration for selected offenses, it appears that the role of fines in U.S. penal policy badly needs to be reexamined.
VI. Comparative Sentencing Patterns

The purpose of our analysis is to determine the actual use of fines relative to other sanctions for comparable crimes in the countries studied. For these countries the primary sanctions of interest, fines and incarceration, raise few questions of qualitative comparability. However, the types of behavior which are criminal can differ significantly across countries, and even for types of behavior that have been criminalized, the classification schemes can be quite different. If our purpose were to compare the severity of sanctions by some quantitative metric these issues would have to be addressed with great care. However, our objective is less ambitious; we do not attempt to deal with all criminal offenses but only with "traditional crimes" and sanctions are compared only in a qualitative fashion. By traditional crimes we mean those forms of behavior which have been criminalized in each of the countries over a long period of time. We thus exclude offenses relating to drugs, both because similar behavior may not be criminalized in all of the countries at present and because, within each of the countries, significant changes may have occurred in their legal treatment in the recent past.

And even among the group of traditional crimes, also excluded were those for which a monetary penalty alone would generally not be considered appropriate, for example, the most serious crimes against the person or society (homicide, treason). By exclusion, we are thus left with moderately to less serious crimes against the person, i.e., assault (excluding aggravated assaults) and property crime which does not involve a serious threat to the person, e.g., we exclude robbery.
Suitable data are available for European countries using their national sentencing data by penal code offenses. The United States data, however, presents two major problems. First, there are fifty one different correctional systems; thus, even if data were available, some selection would be required. The second problem, which solves the first, is that most state court systems do not publish sentencing data classified by specific crime and by type of sanction imposed. Further, such data as is published generally deals only with felony offenses. The potential scope of fines, as an alternative to incarceration, includes both the more serious misdemeanors as well as the less serious felonies. Given these difficulties, we have found suitable sentencing data only for the U.S. District Courts and for the Superior Court of Washington, D.C.

The sentencing data for traditional crimes in each jurisdiction is presented in Table 3. The original data by specific penal code offense is given in the Appendix for those interested in greater detail. Although Table 3 deals only with traditional crimes, this group accounts for over two thirds of all criminal offenses in European countries and over half in the U.S. District Courts. The smaller percentage accounted for by traditional crimes in the Superior Court of Washington, D.C. is due both to proportionately more serious crimes against the person and also more minor crimes, e.g., victimless crimes.

The data clearly establish the heavy reliance placed upon fines by European countries and the relatively low reliance upon incarceration. Among the three countries, it is surprising that Sweden uses fines relatively less than the other two. The very high use of fines in

1Appendix is available on request from the author.
Table 3

Selected Traditional Crimes¹ - Comparative Sentencing Patterns

<table>
<thead>
<tr>
<th>Country:</th>
<th>Total of Selected Defendants:</th>
<th>Percent of All Defendants:</th>
<th>Incarceration:</th>
<th>Fine Only:</th>
<th>All Other:</th>
</tr>
</thead>
<tbody>
<tr>
<td>England and Wales, ¹² 1977</td>
<td>293,580</td>
<td>69%</td>
<td>14%</td>
<td>56%</td>
<td>30%</td>
</tr>
<tr>
<td>Germany, ³¹ 1977</td>
<td>191,329</td>
<td>77%</td>
<td>10%</td>
<td>77%</td>
<td>13%</td>
</tr>
<tr>
<td>Sweden, ⁴¹ 1977</td>
<td>29,121</td>
<td>67%</td>
<td>13%</td>
<td>43%</td>
<td>44%</td>
</tr>
<tr>
<td>United States Federal District Courts, ⁵¹ 1977/78</td>
<td>16,057</td>
<td>56%</td>
<td>39%</td>
<td>5%</td>
<td>56%</td>
</tr>
<tr>
<td>Washington, D.C., Superior Court, ⁶¹ 1974</td>
<td>1,847</td>
<td>38%</td>
<td>32%</td>
<td>4%</td>
<td>64%</td>
</tr>
</tbody>
</table>

¹Selection objective was to include all traditional crimes which did not pose a serious threat to the person, e.g., assaults were included but aggravated assaults were excluded when these could be separately identified.

²Offenses from Table A.1 included are: Other Wounding, Assault, Theft, Fraud and Forgery.

³Offenses from Table A.2 included are: Assault, Theft and Embezzlement, Fraud and Forgery.

⁴Offenses from Table A.3 included are: Assault, Theft (less Grand Theft and Robbery,), Fraud and Embezzlement.

⁵Offenses from Table A.4 included are: Assault, Larceny and Theft, Embezzlement, Fraud, Auto Theft, and Forgery and Counterfeiting.

⁶Offenses from Table A.5 included are: Assault, Larceny, Stolen Vehicle, Forgery and Counterfeiting, Fraud, Embezzlement, and Stolen Property Dealing.
Germany reflects the results of their penal reform and the conscious shift to the use of fines. In contrast, the two U.S. jurisdictions use fines only minimally as a sentence for traditional crimes but use incarceration two to three times as much as European countries. In the concluding section we address the potential sources of this differential use of fines and the lessons that the European experience offers to U.S. policy in this area.

VII. Conclusions

The most significant finding of the comparative analysis is the wide disparity in the use of monetary penalties for traditional crimes between the three European countries as a group and the United States. This, of course, raises the more fundamental question—why should penal policies be so different among countries so similar economically, culturally, and politically? A definitive answer to this question would be the subject of another study; however, some tentative observations are in order.

One possible explanation is that the U.S. population differs significantly in terms of criminological characteristics from the European populations. Although we have compared sentencing patterns for similar categories of specific crimes, there may remain significant differences in the nature of crimes within apparently similar categories. For example, within the assault category, U.S. assaults
may more frequently involve the use of a firearm or other dangerous weapon. Or, the population of U.S. offenders, within a given category, may be composed of a much higher percentage of recidivists than first offenders. If recidivists are given more severe sentences than first offenders, this could explain the lower U.S. use of fines in any given category. Finally, it may be that criminal activity of the U.S. population of offenders and potential offenders is less response to the threat of punishment than European populations. Thus, more severe penalties are required in the U.S. than in Europe to achieve socially acceptable levels of deterrence.

It should be emphasized that all of the above examples are merely speculative; they are not based upon established factual differences. Indeed, they illustrate that existing sentencing policy is to a large extent formulated in a vacuum of empirical knowledge.

It is, of course, also possible that any objective differences in criminological characteristics of the populations are irrelevant; the observed differences in sentencing policies may be the result of philosophic or cultural differences. For example, an experienced official in Swedish corrections has observed that the more racially homogeneous character of the Swedish population supports a strong "humanitarian" basis for Swedish correctional policy while the more racially mixed U.S. population is conducive to a retributive basis for U.S. policy [Marnell, 1972]. There is some support for this as an explanation in the fact that European policy discussions exhibit an explicit a priori distrust of incarceration as a penalty. This distrust appears to be based more upon philosophic or humanitarian considerations than upon utilitarian considerations, e.g., incarceration
may be criminogenic. However, both considerations are expressed. Conversely, as we have illustrated, U.S. policy discussions exhibit a similar a priori distrust of fines. This distrust also appears to be based upon a philosophical set as much as upon utilitarian assumptions, e.g., fines have a very low deterrent value.

A final possible explanation, and one which we would give the most support, is based upon the observation that the central objective of U.S. correctional policy for several decades has been to effect a rehabilitation of offenders. While the achievability of this goal is now seriously questioned, it remains the foundation upon which most existing practices and institutions have been erected. Within such an institutional structure there is little room for monetary penalties. Fines have the potential to punish, and possibly to deter, but not to rehabilitate. Thus, the dominance of a rehabilitative approach to corrections has precluded a serious consideration of the use of fines.

Further, the inattention given to fines has served to indirectly limit their use even more. Given that the statues provide for flat fines and absolute maximums and inflation is a continuing condition of economic life, then continuous "preventive maintenance" of the fine provisions of the penal code by the legislatures is required. If the statutory maximums are not periodically revised, then the real value of the legislated maximums will fall to a point where fines cease to be a viable sentencing option even for judges who would like to use them. The infrequent revision of fine maxima in most U.S. states are indicative of a failure to carry out this preventive maintenance.
In contrast to this philosophical and institutional neglect of fines in the U.S., European countries have consciously designed institutional structures and adopted innovations which minimize the potential defects of monetary penalties and capitalize upon their advantages. Two such innovations in structure appear to be particularly important and worth careful study by U.S. policy makers. These are the day-fine and the summary penal authority given prosecutors in Germany and Sweden.

The day-fine system has many advantages over a system where flat fines are the norm. The day fine forces the sentencing decision process to deal explicitly and independently with both the seriousness of the offense and the offender's financial means. Relating the unit value of the day fine to the offender's financial means both deals with the equity issue and reduces the risk of default. Day fines can also dispell the alleged perception that fines are a "license for crime"; that is, they can produce an absolute monetary penalty which would be viewed as clearly punitive even for offenders with relatively abundant financial resources. Put somewhat differently, as a form of punishment day fines have an "expressive value" that flat fines lack because they are so commonly used to regulate forms of behavior that clearly are not criminal, e.g., minor traffic violations.

Finally, inflation does not erode the punitive capacity of the day-fine structure. The statutes set limits in terms of the number of day-fines, the courts set unit values--case by case--on the basis of
current incomes and current incomes rise with inflation. Thus, day fines are automatically indexed against inflation.

Another innovation used in Sweden and Germany is the summary penalty authority of the public prosecutor. This authority is generally applicable only to offenses punishable by fines; however, since fines are authorized for a wide range of offenses, a large number of offenses can be disposed of by this procedure. The summary penalty procedure reduces the cost of adjudication and the use of fines reduces the cost of punishment. An accused who is subjected to a summary penalty may reject this disposition and receive a court trial; thus, due process is not replaced.

The summary penalty procedure would appear to offer far less opportunity for abuse than our informal plea bargaining procedure. Further, since most of the large flow of moderately serious cases may be disposed expeditiously through by summary penalties, more prosecutorial resources are available to deal with the most serious cases.

A final innovation adopted in Sweden, is the use of a central government debt collection authority. The collection of fines levied by the courts become the administrative responsibility of this central authority. The authority has broad authority to effect the collection. The advantage of this procedure is that the major administrative burden of fine collection is removed from the courts.

Throughout this study the emphasis has been upon the economic advantages of monetary penalties in the form of fines over incarceration as a penalty. From this point of view, there is no difference
between monetary penalties in the form of fines from monetary penalties in the form of restitution; both represent a lower economic cost to society of punishment than incarceration. The use of incarceration reduces the total economic output of society by immobilizing the labor resources of the offender and society's resources needed to enforce the sentence. By substituting, at the margin, monetary penalties for incarceration more resources become available for economic production and an economic gain is realized. The difference between fines and restitution rests in how this gain is distributed. Fines distribute it exclusively to taxpayers, while restitution distributes it, in part, to the offender's victim. Which of these distributions is superior is an ethical judgment, not an economic judgment. The economic judgment is that, other things equal, monetary penalties, in either form, are superior to incarceration.

We concluded that the above analysis has established a strong presumption that U.S. sentencing policy fails to utilize monetary penalties as an alternative to incarceration up to the point where the marginal social cost of punishment for each is equal. Consequently, the social cost of crime and crime control is higher than it need be. Although our evidence is not claimed to be conclusive, it does point to a serious need to both re-think the a priori basis of current U.S. policy, i.e., punishment versus rehabilitation, and to initiate the necessary research to fill the vacuum of empirical knowledge in which this policy has been formulated.
References:

Albrecht, Hans-Jörg, Criminological Research at the Max Planck Institute and Its Results, Freiberg, Germany 1978, pp. 46.


Aström, Karsten, "Fines and Short-term Imprisonment," Criminal Institute, Stockholm University, No. 41, 1977 (Processed).


United States Supreme Court, Tate v. Short, 401 U.S. 395, 1971.
